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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 440

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (A. 48–49) is reported at 408 F. 2d 681. The decision and order of the National Labor Relations Board (A. 3–24) are reported at 160 NLRB 1603.

JURISDICTION

The judgment of the court of appeals dismissing the Board's petition for enforcement was entered on February 19, 1969 (A. 49). The Board's timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 8, 1969 (A. 51). The petition for a writ of certiorari was filed on August 6, 1969, and was granted on November 10, 1969 (A. 52). The

jurisdiction of this Court rests on 28 U.S.C. 1254(1), and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 16–18.

QUESTION PRESENTED

Whether, where the National Labor Relations Board sets aside a representation election because of an employer's unfair labor practices and enters an order barring such conduct in the future, judicial proceedings to enforce that order are rendered moot because an additional, valid election, which the union again lost, has been conducted in the interim.

STATEMENT

In the fall of 1964, the International Union of Electrical, Radio and Machine Workers, AFL–CIO,[1] initiated an organizing campaign among the production and maintenance employees at the Company's electronics plant in Mountain View, California. There were over 500 employees in the unit which the Union sought to organize; they worked on three shifts, and many lived some miles from the plant. (A. 10, 18–19.) In January 1965, the Union filed a petition for a Board representation election, which was scheduled for February 4, 1965 (A. 9–10).

[1] The Union intervened in the court of appeals, and thus is a party here.

During the week before the election, employee Carol Alvarado was twice called to the desk of her supervisor, Nicola Krest, and questioned about her union activities. Krest threatened that the advent of the Union would result in stricter discipline (A. 10–11). The Company also sent Robert Hennemuth, Vice-president for Industrial Relations, from its Massachusetts headquarters to talk with the Mountain View employees. On February 2, just two days before the Board election, Hennemuth delivered a prepared speech to seven separate groups of employees, assembled on plant premises. Hennemuth stressed that, if the Union came in, negotiations would begin from scratch and thus that employee benefits might be reduced (A. 11–15). With respect to paid sick leave, a major campaign issue, Hennemuth told the employees that, "even if a union does come on these premises as a result of Thursday [election day] that does not mean any such union will get paid sick leave. And I'm saying to you right now, it won't" (A. 14). Hennemuth also announced an improved grievance procedure (A. 4, n. 2).

The Union lost the election,[2] and thereafter filed both objections to the election and unfair labor practice charges based on the Company's preelection conduct. On October 19, 1965, an unfair labor practice complaint issued, alleging that the Company's conduct had restrained and coerced the employees, in violation

[2] 161 votes were cast for the Union, 54 for the International Brotherhood of Electrical Workers, which had intervened in the proceeding and was also on the ballot, and 301 for no union (A. 10).

of Section 8(a)(1) of the Act. The unfair labor practice proceeding was consolidated with the objections to the election proceeding (A. 10, 18). In October, 1966, the Board, adopting in substantial part the findings of its Trial Examiner, concluded that the Company had violated Section 8(a)(1) and interfered with a free election in that Supervisor Krest's interrogation of employee Alvarado was coercive, Vice-president Hennemuth's speeches to the employees threatened a loss of existing benefits and a refusal to bargain with a union, and his announcement of a new grievance procedure constituted a promise of benefit. (A. 4, n. 2, 17). The Board ordered the Company to cease and desist from:

> (a) Interrogating its employees in an unlawful manner concerning their union activities; threatening or implying a loss of existing benefits in the event they choose union representation; threatening or implying an anticipatory refusal to bargain on bargainable issues, such as sick leave, in such event; and promising new benefits as an inducement to employees not to engage in union activity. [A. 21, 5.]
>
> (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act * * *. [A. 5.]

The Company also was ordered to post notices in its plant for a period of 60 days, advising the employees of the terms of the Board's order and of the Company's intention to abide thereby (A. 5–6, 21). Additionally, the Board set aside the election and directed that a new one be held at such time as its Regional Director deemed appropriate (A. 6–7).

On February 8, 1968, pursuant to Section 10(e) of the Act, the Board petitioned the court of appeals to enforce its unfair labor practice order (A. 25–26). The Company moved to dismiss the proceeding on the ground that it had become moot when the Union lost two other elections which had meanwhile been held (A. 29–31). The first of these was held on June 23, 1967; the Union lost by a vote of 418 to 312, but the Board set the election aside because of the Company's further acts of interference. The final election was held on November 1, 1968, while the enforcement proceeding was pending; the Union lost by a vote of 258 to 204, and, since no objections were filed, the Board certified the results of this election (A. 30–31, 32–34). Both the Board and the Union filed oppositions to the Company's motion (A. 37–40, 41–47). On February 19, 1969, the court of appeals dismissed the enforcement proceeding as moot on the authority of its earlier decision in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (C.A. 9), which involved a similar situation (A. 48–49).

SUMMARY OF ARGUMENT

The holding of a valid representation election does not moot a Board order requiring an employer to remedy unfair labor practices committed during a prior election campaign. "[I]f the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." *National Labor Relations Board* v. *Marsh Supermarkets,* 327 F. 2d 109, 111 (C.A. 7), certiorari denied, 377 U.S. 944.

The contrary holding of the court below is apparently based on the assumption that a remedial order is unnecessary because the employer has ceased his unlawful conduct and because a recurrence of the organizational activity which stimulated the earlier unfair labor practices is unlikely. But it is well settled that an "employer's compliance with an order of the Board does not render the cause moot." *National Labor Relations Board* v. *Mexia Textile Mills,* 339 U.S. 563, 567. And, on the record here, there is no valid basis for concluding that no future organizational activity will occur at the Company's plant.

The effect of the court's order is to make it much less likely that employees will be assured that their activities will be free from Company coercion, and more difficult for the Board to deal with such coercion should it recur, by freeing the employer of any need ever to dispel the effects of his initial coercion. The order seems to view the Act as designed merely to protect a particular election or organizational process; but the public interest is not satisfied by the

fact that a valid election was held. There must also be assurance that Company's employees can engage in future organizational activities free from their employer's coercion.

ARGUMENT

THE BOARD'S ORDER REQUIRING THE COMPANY TO CEASE AND DESIST FROM THE UNFAIR LABOR PRACTICES FOUND WAS NOT MADE MOOT BY THE SUBSEQUENT HOLDING OF A VALID ELECTION

1. In *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567, this Court held that an "employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court." For "[a] Board order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair labor practice barred by an enforcement decree" (*ibid.*). "The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices" (*id.*, at 568). Accord, *National Labor Relations Board* v. *Pool Mfg. Co.*, 339 U.S. 577; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 271.

Similarly, in other contexts, the Court has held that voluntary compliance will moot a case only where the alleged wrongdoer has overcome the "heavy burden" of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633. For,

unless the agency's order is enforced, the alleged wrongdoer is free to resume the challenged conduct at will. *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 43; *Gray* v. *Sanders,* 372 U.S. 368, 375–376. The agency is entitled to a decree so that it may have recourse to contempt proceedings, should the conduct recur. *Walling* v. *Reuter Co.,* 321 U.S. 671, 673–674. Moreover, even though the private interests affected by the conduct involved may be vindicated without recourse to a court decree, the case will not be moot where the decree nevertheless is necessary "in furtherance of the public interest." *Walling* v. *Reuter Co., supra,* at 674. See also *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 309. *Wirtz* v. *Local 153, Glass Blowers Ass'n,* 389 U.S. 463, 474–475; *United States* v. *Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203.

Consistent with these principles, other courts of appeals faced with the identical situation presented here have uniformly rejected the claim that a subsequent election renders moot a proceeding for enforcement of a cease and desist order relating to employer misconduct at the time of an earlier election. As stated in *National Labor Relations Board* v. *Marsh Supermarkets,* 327 F. 2d 109, 111 (C.A. 7), certiorari denied, 377 U.S. 944, "if the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." Accord, *National Labor Relations Board* v. *Metalab-Labcroft,* 367 F. 2d 471, 472 (C.A. 4); *Na-*

tional Labor Relations Board v. *Clark Bros.*, 163 F. 2d 373, 375 (C.A. 2).

2. As shown above (pp. 2–4), the Board found that during the course of an election campaign the Company engaged in conduct which violated Section 8(a)(1) of the Act and also prevented the holding of a fair election. The Board ordered the Company to cease and desist from the unfair labor practices found and also set aside the election the Union had lost and directed a second election at such time as the Regional Director deemed appropriate. The Company declined to comply with the unfair labor practice order, necessitating judicial proceedings to enforce the order. Meanwhile, the Union proceeded to a second election,[3] which was again set aside because of new acts of employer misconduct. And, about 17 months later, the Union proceeded to a third election, which it again lost, but this time no objections were filed, and the Board certified the result as valid.

The court below apparently reasoned that, since a valid election had been held, a remedial order in the unfair labor practice proceeding was unnecessary because the Company must have ceased its unlawful conduct, and a recurrence of the organizational activity which stimulated the unfair labor practices was

[3] Normally the Board will not hold a representation election until any outstanding unfair labor practices have been remedied. However, the Board will schedule an election at an earlier time if the party affected by the unfair labor practices makes a request to proceed. That party, however, may not rely on these unfair labor practices as a basis for setting aside the second election. See *Wm. L. Hoge & Co., Inc.*, 103 NLRB 20, n. 4; *Inyo Lumber Co.*, 92 NLRB 1267, n. 2.

unlikely.[4] Under the legal principles set forth above (pp. 7–9), the first assumption does not justify a refusal to enforce a Board order. Moreover, the second assumption is untenable.

The Board's experience has been that multiple election campaigns not infrequently precede successful organizational activity. Indeed, in its brief in the court below, the Company stated that "Approximately nineteen petitions for election have been filed at Raytheon plants during the period 1960–1966 * * *" (Br. p. 4). The Company plant involved here is large—over 500 employees were eligible to vote in the election; it is operated on three shifts; and its employees commute to work from a wide geographic area. It is not surprising, therefore, that organization might require a long term effort. And, although the Union lost three elections, each time its proportion of the vote increased. There is thus no reason to conclude, on the record here, that organizational efforts by the Union or some other labor organization have

[4] As articulated in its earlier opinion in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570, 571–572, the court below relied on certain language in *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416. There this Court stated that, "Where the order obviously has become moot, the court can deny enforcement without further ado." *Id.*, at 428. However, the quoted language suggests only that a reviewing court may consider the issue of mootness in the first instance; it does not indicate the circumstances under which a case is to be considered moot. Moreover, since the issue in *Jones & Laughlin* (whether a Board order covering plant guards was rendered moot by the subsequent deputization of those guards by the city) was entirely different from that here, the case cannot fairly be read as suggesting that a Board order should not be enforced in the present situation.

ended at the Mountain View plant, or that the Company would not resume its coercive interrogation, threats, and inducements should another election drive commence.[5]

3. The Board's order is primarily directed to protecting the *employees'* Section 7 rights. Hence, apart from any new organizational campaign initiated by a labor organization, the employees are entitled to assurance that whatever future organizational efforts they may undertake will be free from Company coercion.[6] The position of the court of appeals frustrates this purpose.

Ordinarily, the prospect that prompt compliance with a Board remedial order might dissuade the Board

[5] Section 9(c)(3) of the Act prohibits the direction of an election within 12 months of a valid certification. That period expired November 12, 1969. We have been advised that the International Brotherhood of Electrical Workers, which appeared on the ballot in the first election (n. 2, *supra*), is currently engaged in an organizational effort at the Mountain View plant.

[6] There is no substance to the Company's contention (Br. in Opp., p. 6) that the court below could have refused to enforce the Board's order because "the alleged unfair labor practice violations were so indigenous to the particular election campaign and of such a marginal nature as to render determination of the merits of the Board's findings inappropriate." The conduct found to be unlawful consisted of coercive interrogation, threats of loss of existing benefits, and promises of new benefits if union activity were discontinued; these are the typical types of restraint and coercion engaged in by an employer desirous of throttling organizational activity, and they are far from marginal. Moreover, the Board's order (*supra*, p. 4) bars not only a repetition in future campaigns of these specific coercive acts, but also directs the Company to refrain from violating its employees' Section 7 rights "in any like or related manner."

from seeking enforcement in the court of appeals will encourage employers to post the required notices immediately upon the Board's decision. Assuming the Board to have chosen an effective remedy, this will clear the air in relatively short order for future elections. While the contempt remedy will not be available if new unfair labor practices are thereafter committed, the employees in any subsequent election will at least have the benefit of knowing that their rights are being protected, and that their employer has been made to retract his coercive acts impinging upon them. But the employer knows that the union is likely to seek a second election before enforcement proceedings in the court of appeals can be ended;[7] if that election will moot the Board's order, the employer would find much less to gain from immediate compliance. He may be able to enjoy both the lingering effects of his initial coercion and freedom from any subsequent need to post notices and otherwise comply with the Board's remedy.

Of course, an employer campaigning against a union may and need not immediately comply with the Board's order—and, as shown (*supra*, pp. 7–8), the Board is entitled to seek enforcement even if he does. But the consequence of the Ninth Circuit's decision is

[7] The Board's records show that during the period July 1, 1967, to June 30, 1968, the median time between the issuance of a Board unfair labor practice order and a decision by the court of appeals was 542 days. In the present case, the period was 28 months.

that the employees never obtain any relief, however belated, for the harm done to them on account of their organizational activity. Even though the Board in certain circumstances permits the holding of a second election before outstanding unfair labor practices are remedied (*supra*, n. 3), this does not obviate the need for a remedy. Unredressed unfair labor practices can cast a long shadow into the future. The pressure a union may feel to participate in a second election before the conclusion of enforcement proceedings, rather than risk attrition in employee interest and support over time, should not relieve the employer of the necessity ever to comply with the Board's remedy. He would then be free to counter renewed organizational efforts by again engaging in the same kinds of unfair labor practices, without the possibility of triggering a contempt sanction, and thereby start the same cycle over again. In short, the decision below would in effect reward the employer for his non-compliance with the Act and Board orders issued pursuant thereto. Cf. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 610–611.

This Court recently had occasion to consider a similar problem. In *Wirtz* v. *Local 153, Glass Blowers Ass'n*, 389 U.S. 463, the Court reversed the Third Circuit's holding that an intervening union election mooted a suit by the Secretary of Labor challenging a prior union election on the ground that it did not comply with the standards prescribed by Title IV of the Labor-Management Reporting and Disclosure Act

of 1959, 29 U.S.C. 481. The Court held that, "Aborting the exclusive statutory remedy would immunize a proved violation from further attack and leave unvindicated the interests protected by Section 401." *Id.*, at 475. Rejecting the argument of the Third Circuit that "no practical purpose" would be served by voiding the tainted election, the Court stated: "First, [the argument] fails to consider the incumbents' possible influence on the new election. Second, it seems to view the Act as designed merely to protect the right of a union member to run for a particular office in a particular election. But the Act is not so limited, for Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." (*Ibid.*)

These considerations are equally applicable here. For here, absent an enforced Board order, the Company is free to interfere with future elections. And here, as there, the public interest is not satisfied by the fact that a valid election was held. The public interest requires assurance that the Company's employees can engage in future organizational activities free from coercive practices by their employer.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals dismissing the Board's enforcement petition should be reversed and the case should be

remanded to that court for consideration of the unfair labor practice case on the merits.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

DECEMBER 1969.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

Sec. 9(c) * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. * * *

* * * * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply

to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record.

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